COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 14, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2677

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

GERALD BREEN and
SHARON BREEN,

Plaintiffs-Respondents-Cross Appellants,

v.

DAVID J. WINKEL and
WISCONSIN LAWYERS MUTUAL
INSURANCE COMPANY,

Defendants-Appellants-Cross Respondents,

CUMMINGS, SNYDER, HANES &
WIEGRATZ, S.C., A/K/A REMLEY
SENSENBRENNER LAW OFFICE,

Defendant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: RICHARD G. GREENWOOD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Fine, JJ.

CANE, P.J. David Winkel and Wisconsin Lawyers Mutual Insurance Company (collectively, Winkel) appeal a circuit court judgment confirming an arbitration award of $135,000 to Gerald Breen and $25,000 to Sharon Breen. The Breens cross-appeal from the circuit court's denial of costs. We conclude that the arbitration award does not constitute a manifest disregard of the law or violate strong public policy and, therefore, affirm the circuit court's judgment confirming the arbitration award. Additionally, we conclude that the parties' arbitration agreement prohibits the awarding of costs and, therefore, affirm the circuit court's judgment denying costs.

Although the issues on appeal concern confirmation of the arbitration award, a brief examination of the background and procedural facts is particularly helpful in this case. The Breens operated a retail bath boutique and kitchen remodeling business. When they experienced cash flow problems, they consulted Winkel for legal advice. Ultimately, the Breens were charged with the criminal offense of theft by contractor, contrary to §§ 779.02(5) and 943.20(1)(b), STATS., for failing to pay subcontractors. Gerald pled no contest to three misdemeanor counts of theft by contractor, and the charges against Sharon were dropped.

The Breens filed suit against Winkel, his insurer and his law firm, alleging that the criminal prosecution was the result of negligent legal representation and seeking damages that included compensation for Gerald's emotional trauma and psychological injuries. The Breens also sued for breach of contract. Winkel moved for summary judgment on the issue of liability for emotional distress damages in a non-traumatic economic loss claim. The circuit court denied Winkel's motion, and we denied Winkel's petition for leave to appeal.

The parties entered into an arbitration agreement, agreeing to submit their case to binding arbitration. The parties agreed the arbitrator's award would be final and binding, subject only to appeals under ch. 788, STATS., governing arbitration. The arbitrator concluded Winkel had negligently provided legal services and awarded Gerald $85,000 for loss of earning capacity and $50,000 for emotional illness and distress. The arbitrator awarded Sharon $25,000 for attorney's fees and other expenses of defending the criminal prosecutions and damages for loss of society, companionship and consortium of her husband.

The Breens moved the circuit court to confirm the arbitration award. Winkel moved to vacate the award, arguing the damages award for emotional distress in the non-traumatic economic loss claim of legal malpractice violated strong public policy and constituted a perverse misconstruction and manifest disregard of existing law. Specifically, Winkel asked the circuit court to strike the award of $50,000 to Gerald for emotional illness and to remand the case to the arbitrator to remove that portion of Sharon's compensation the arbitrator attributed to loss of society, companionship and consortium of her husband. The trial court granted the Breens' motion, denied Winkel's motion, and issued a decision confirming the arbitrator's award and denying the Breens costs.

On appeal, Winkel raises numerous issues, including several that ask this court to determine the law on negligent infliction of emotional distress in Wisconsin. Other issues include whether the arbitrator's decision constitutes a manifest disregard of existing law, whether the facts support allegations of compensable severe emotional distress, and whether the circuit court erroneously exercised its discretion when it confirmed the arbitration decision without addressing public policy concerns. Given the posture of this case, it is appropriate that we consider only the following issues on appeal, whether: (1) any facts support Gerald's allegations of compensable severe emotional distress; (2) the arbitration decision demonstrates a manifest disregard of the law; and (3) the decision violates strong public policy. We also consider the Breens' cross-appeal on the issue of costs.

An arbitrator's award is presumptively valid and will be disturbed only when its invalidity is demonstrated by clear and convincing evidence. ***Milwaukee Bd. v. Milwaukee Teachers' Educ. Ass'n***, 93 Wis.2d 415, 422, 287 N.W.2d 131, 135 (1980). We review the arbitrator's award without deference to the circuit court's decision. *See* ***Lukowski v. Dankert***, 184 Wis.2d 142, 149, 515 N.W.2d 883, 886 (1994).

When reviewing an arbitration award the function of the courts is essentially supervisory, ensuring that the parties received the arbitration for which they bargained. ***Id***. Courts are guided by the general statutory standard listed in §§ 788.10 and 788.11, STATS.,[1] and by the standards developed at

[1] Section 788.10, STATS., provides:

(..continued)

Vacation of award, rehearing by arbitrators. (1) In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud or undue means;

(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(2) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

Section 788.11, STATS., provides:

Modification of award. (1) In either of the following cases the court in and for the county wherein the award was made must make an order modifying or correcting the award upon the application of any party to the arbitration:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award;

(b) Where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted;

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

(2) The order must modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

common law. ***Id***. at 150-51, 515 N.W.2d at 886. If these general standards are not violated, the arbitrator's award should be confirmed by the circuit court. ***Id***. at 151, 515 N.W.2d at 886. Courts will overturn an arbitration award only if there is a perverse misconstruction or if there is positive misconduct plainly established, or if there is a manifest disregard of the law, or if the award is illegal or violates strong public policy. ***Id.*** at 149, 515 N.W.2d at 886; *see* ***Whitewater Educ. Ass'n v. Whitewater Unified Sch. Dist.***, 113 Wis.2d 151, 157, 335 N.W.2d 408, 411 (Ct. App. 1983) (decisions of an arbitrator cannot be interfered with for mere errors of judgment as to law or fact).

First, Winkel argues the facts do not support the Breens' allegations of compensable emotional distress, referring to medical records and depositions in his appendix in support of his argument. We need not consider Winkel's argument because he has failed to provide us with adequate legal authority identifying the appropriate standard of review of an arbitrator's factual findings. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980) (arguments unsupported by references to legal authority will not be considered). Moreover, we have no means of reviewing the information presented to the arbitrator because Winkel did not take the opportunity to have the arbitration hearing recorded. For these reasons, we conclude Winkel's first argument must fail.

Second, Winkel argues that by awarding emotional distress damages, the arbitrator acted with manifest disregard of existing law. Manifest disregard of the law means that the arbitrator understood and correctly stated the law but ignored it. ***City of Madison v. Local 311, Int'l Ass'n of Firefighters***, 133 Wis.2d 186, 191, 394 N.W.2d 766, 769 (Ct. App. 1986). In his written decision, the arbitrator simply awarded Gerald damages for emotional illness and distress, without discussing the basis for his conclusion that the damages were appropriate or the law of negligent infliction of emotional distress.[2] However, we know that the legal issue was raised before the arbitrator because counsel for Winkel acknowledged at a circuit court hearing on the motion to vacate that he argued to the arbitrator that emotional damages cannot be awarded in this case.

[2] The arbitrator's lack of legal analysis in his decision is not a basis to vacate the award. *See* ***McKenzie v. Warmka***, 81 Wis.2d 591, 601, 260 N.W.2d 752, 757 (1978) (arbitrator need not render an account of the reasons for his award).

We conclude the arbitrator's conclusion does not constitute a manifest disregard of the law. We note that many cases involving negligent infliction of emotional distress are bystander cases, where a plaintiff alleges emotional distress arising from a tortfeasor's negligent infliction of physical harm on a third person. *See* ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 632-33, 517 N.W.2d 432, 434-35 (1994) (defining bystander cases). However, the tort has also arisen in non-bystander cases. In ***Ver Hagen v. Gibbons***, 47 Wis.2d 220, 177 N.W.2d 83 (1970), the plaintiff claimed he suffered shock, mental anguish and great anxiety when his negligently-constructed fireplace and home were consumed by fire. Our supreme court held that in order to recover, a plaintiff's emotional stress must be manifested by physical injuries in actions based on negligence rather than intentional conduct. ***Id***. at 227, 177 N.W.2d at 86.

In ***La Fleur v. Mosher***, 109 Wis.2d 112, 325 N.W.2d 314 (1982), a fourteen-year-old girl sued the City of LaCrosse for negligent infliction of emotional distress because she was held in a jail cell for over thirteen hours without food, water and blankets. Our supreme court held that under the appropriate and limited circumstances, a plaintiff may maintain an action for emotional distress caused by negligent confinement in the absence of physical injuries. ***Id***. at 15, 325 N.W.2d at 315.

Our supreme court held in ***Bowen***, a bystander case, that although a plaintiff in a cause of action for negligent infliction of emotional distress must prove severe emotional distress, the plaintiff need not prove physical manifestation of that distress. ***Id.*** at 632, 517 N.W.2d at 434.

Although there has been no previous case dealing with a claim of negligent infliction of emotional distress claim in a legal malpractice case,[3] we conclude the arbitrator's conclusion that Gerald could recover damages for emotional injuries does not constitute a manifest disregard of the law. First, there is precedent for allowing plaintiffs to maintain claims for negligent

[3] The lack of prior cases directly on point does not prohibit the arbitrator from applying the law. *See* ***Lukowski v. Dankert***, 178 Wis.2d 110, 116, 503 N.W.2d 15, 18 (Ct. App. 1993) ("In resolving the dispute in arbitration, the arbitration panel was free to fill in the interstices in the existing relevant law."), *aff'd*, 184 Wis.2d 142, 515 N.W.2d 883 (1994).

infliction of emotional distress in non-bystander cases. *See e.g.*, ***La Fleur***, 109 Wis.2d at 115, 325 N.W.2d at 315.

Second, the arbitrator could have concluded that Gerald satisfied the standard established in ***Ver Hagen*** if he introduced evidence, which he claims he did, that he suffered physical manifestations of severe emotional distress. *See* ***id.***, 47 Wis.2d at 227, 177 N.W.2d at 86 (plaintiff's emotional distress must be manifested by physical injuries). Alternatively, even if the arbitrator concluded Gerald had suffered no physical injuries, he could have concluded that applying the rationale of ***Bowen*** to this non-bystander case, physical manifestation of emotional distress is no longer required where the plaintiff proves severe emotional distress. Although this court expresses no opinion on the validity of these legal hypotheses, we conclude that in light of case law in this area, the arbitrator's conclusion that Gerald could recover damages for emotional injuries in a legal malpractice case does not constitute a manifest disregard of the law.

Next, we address Winkel's argument that the arbitrator's award should be vacated because the arbitrator did not address public policy considerations and because the award violates strong public policy. First, Winkel argues "***Bowen*** mandates that all trial courts and arbitrators examine the issue of negligent emotional distress and address the following six public policy considerations." We reject this argument for several reasons. We observe that ***Bowen*** did not even mention the word arbitration and, thus, should not be read as mandating that arbitrators explicitly address specific considerations. Moreover, we have no way of knowing if the arbitrator addressed public policy or other considerations, because Winkel did not have the arbitration transcribed. Finally, the arbitrator's lack of legal analysis in his decision is not a basis to vacate the award. *See* ***McKenzie v. Warmka***, 81 Wis.2d 591, 601, 260 N.W.2d 752, 757 (1978) (arbitrator need not render an account of the reasons for his award).

Also, we are not convinced that the award violates strong public policy. When a court bars enforcement of an arbitration award on the basis of public policy, that public policy must be clearly defined. ***Local No. P-1236 v. Jones Dairy Farm***, 680 F.2d 1142, 1145 (7th Cir. 1982). As we have already noted, our supreme court has allowed plaintiffs to recover for emotional injuries in non-bystander cases, *see* ***La Fleur***, 109 Wis.2d at 115, 325 N.W.2d at 315, and

in cases where there is no physical manifestation of emotional injury, *see* ***Bowen***, 183 Wis.2d at 632-33, 517 N.W.2d at 434. We cannot conclude, given the state of the law at this time, that the arbitrator's decision violates strong public policy.

Because we conclude awarding Gerald damages for emotional injuries does not constitute a manifest disregard of the law or a violation of strong public policy, we affirm the circuit court's confirmation of Gerald's award. Additionally, we affirm the circuit court's confirmation of Sharon's award. The only basis Winkel offers to reverse Sharon's award is that Sharon's claim derives from Gerald's claim. Because we have affirmed Gerald's award, we affirm Sharon's derivative claim as well.

Finally, we consider the Breens' cross-appeal concerning the issue of costs, which the circuit court denied based on the parties' arbitration agreement. The Breens argue that pursuant to § 814.01, STATS., "costs shall be allowed of course to the plaintiff upon a recovery," and, therefore, the question is not whether costs are awardable but whether the Breens contracted away their right to claim an award of costs at the circuit court level.

Arbitration matters are subject to the law of contracts, and the court's role is to assure that the parties receive the arbitration for which they contracted. ***City of Madison v. Madison Professional Police Officers Ass'n***, 144 Wis.2d 576, 585-86, 425 N.W.2d 8, 11 (1988). Absent an ambiguity, the interpretation of a contract is a question of law. ***Schlosser v. Allis-Chalmers Corp.***, 86 Wis.2d 226, 244, 271 N.W.2d 879, 887 (1978). As an appellate court, we are not bound by the circuit court's conclusions of law and decide the matter de novo. ***First Nat'l Leasing Corp. v. Madison***, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977). Whether a contract is ambiguous is also a question of law. *See* ***Lamb v. Manning***, 145 Wis.2d 619, 627, 427 N.W.2d 437, 441 (Ct. App. 1988). A contract provision that is reasonably susceptible to more than one construction is ambiguous. ***Garriguenc v. Love,*** 67 Wis.2d 130, 135, 226 N.W.2d 414, 417 (1975).

The arbitration agreement provides in relevant part: "[N]either party shall seek, nor shall the arbitrator award, any taxable costs which, in accordance with Wisconsin law, might otherwise be properly taxable." Additionally, several paragraphs later, the agreement provides that either party

may have any award confirmed by the appropriate circuit court, that judgment may be entered accordingly and that appeal from the judgment may be taken pursuant to ch. 788, STATS.

We conclude this language is not reasonably susceptible to more than one construction and, therefore, it is not ambiguous. *See* ***Garriguenc***, 67 Wis.2d at 135, 226 N.W.2d at 417. The unambiguous meaning is that neither party shall seek costs that might otherwise be properly taxable. Although the agreement contemplates confirmation proceedings in the circuit court, as well as appeals to this court, no attempt is made to distinguish the parties' clear statement that neither party may seek costs. Therefore, we conclude the Breens are not entitled to costs and affirm the circuit court's judgment denying them costs.

For the foregoing reasons, we affirm the circuit court's judgment confirming the arbitration award and rejecting the Breens' claim for costs. We also note that we do not intend our conclusions affirming the arbitration award to represent new law on negligent infliction of emotional distress. Given the limited standard of review of arbitration awards, we conclude only that the award in this case does not constitute a manifest disregard of the existing law or violate strong public policy. *See* ***Lukowski***, 184 Wis.2d at 154, 515 N.W.2d at 888 ("We emphasize that our holding is limited to the standard of review question applicable in this arbitration.").

By the Court.—Judgment affirmed. No costs on appeal.

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